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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

JERRY DUPLER,

Petitioner,

v.

MANSFIELD JOURNAL CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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QUESTIONS PRESENTED

When a jury answers questions specifically finding actual malice by clear and convincing evidence at the time of publication, does a reversal by a reviewing Court at the pre-trial summary judgment stage violate this Court's decision enumerated in the *Hutchinson v. Proxmire* ruling and the due process clause of the Fourteenth Amendment to the United States Constitution?

Does the decision below conflict with this Court's decision rendered in the *Hutchinson v. Proxmire* case and the due process clause of the Fourteenth Amendment to the United States Constitution?

Is there confusion among the several states and various Federal Courts on the propriety of the use of summary judgments in deciding the issue of actual malice in libel cases requiring a clarification by the United States Supreme Court?

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Brief of Petitioner

The Petitioner, Jerry Dupler, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of Ohio rendered in these proceedings on December 17th, 1980, and the denial of a motion to rehear the case by that Court entered on January 22nd, 1981.

OPINIONS BELOW.

The opinion of the Supreme Court of Ohio is reported and appears in 64 Ohio St. 2d 116 (1980). The opinion is reprinted herein at Appendix A, *infra*, p. A-1,.

The opinion of the Court of Appeals For Tuscarawas County, Ohio, Fifth Appellate District, is unreported and appears at Appendix B, *infra*, p. B-1,. The opinion and judgment entry of the Tuscarawas County Court of Common Pleas relative to respondent's motion for summary judgment is unreported and appears at Appendix C, *infra*, p. C-1.

JURISDICTION

The order or judgment of the Supreme Court of Ohio was entered on December 17th, 1980. See Appendix A. *infra*. A motion for rehearing before that Court was timely filed on December 29th, 1980. See Appendix D. *infra*. This Motion for rehearing was denied on January 22nd, 1981. See Appendix E. *infra*. This petition for certiorari was filed within 90 days from the date aforesaid. The jurisdiction of this court is invoked under 28 U. S. C. 1257 (3).

CONSTITIONAL PROVISIONS INVOLVED.

Constitution of the United States, Amendment XIV:

"...nor shall any state deprive any person of life, liberty, or property without due process of law..."

Ohio Constitution of 1851, Art. I, Sec. 5 (Amended 1912):

"The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."

STATEMENT OF FACTS

Petitioner, Jerry Dupler filed a Complaint for damages against Respondent, Mansfield Journal Company (publisher of the Times-Reporter Newspaper located in Dover-New Philadelphia, Ohio), on or about March 12, 1976. Petitioner's cause of action arose against Respondent based upon a series of newspaper stories and an article appearing in the Editorial page of the Times-Reporter between the dates of April 4th and 9th, 1975. These articles are reproduced by Petitioner in Appendices H, I, and J, *infra*.

Subsequent to the appearance of the articles by the Respondent, the Petitioner, pursuant to Ohio Revised Code 2739.13 and 2739.14, issued a statutory request for retraction, said statutes are reproduced in Appendix K, *infra*.

The Respondent, being aware of the statutory requirements regarding "publishing corrected statements", failed to comply with said statutes in the following manner:

(1) Additions to the article were made.

(2) The article did not occupy a like space in the newspaper as the original.

(3) The article omitted the phrase "Editorial Retraction" and substituted the phrase "Editorial Rebutted."

(4) It added the Petitioner's name to the article as though it were merely a letter to the Editor.

Petitioner's complaint alleged the Respondent's article of April 9th, 1979 "wilfully and with actual malice and intending to injure and defame the Plaintiff (Petitioner herein) in his character and reputation and to injure his profession and vocation intentionally, published in said newspaper, the Times-Reporter, the editorial accusing Plaintiff of Criminal Conduct."

Petitioner, on the date of the article, was a Dover,

Ohio, City Councilman, an employee of Kline Potato Chip Company, a licensed private investigator, and also a mayoral candidate.

The article which defamed this Petitioner, which was written by Harry Yockey, Editor of the Times-Reporter, appears in Appendix J, *infra*.

Testimony from Mr. Yockey states (R. 96) that he took all his information for the April 9th, 1975 from two prior articles which gave the true facts, this showing he had actual knowledge at the time of writing his story that it was false. Mr. Yockey during the trial of the case further admitted the following:

(a) That said Appellee maintained *a biographical file* on this Appellant. (R. 97).

(b) That the need for a search warrant as appeared at paragraph No. 4 of the April 9, 1975, Article was a *false statement* when compared to the April 8th, 1975, Article (R. 108 and 109)

(c) That the comment (paragraph No. 3 of the April 9, 1975, article) "under Ohio Law private investigators must inform authorities *12 hours in advance* of participation in a case" *was a false statement* when compared to Ohio Revised Code 4749.05 (R. 101, 102, 103 at line 13)

(d) That the April 9th, 1975, Article, which accused Appellant of violating Ohio Law twice (paragraph No. 5) *was false*, since prior news articles stated there had been no obstruction of justice. (R. 105, 106 and 107 at line 5)

(e) That the April 9, 1975, Article at paragraph No. 5 states "*if* he is qualified as a licensed private investigator", when the prior article states *he was* a licensed investigator. (R. 110 at line 24)

(f) That Yockey "*TOTALLY DISREGARDED WHATEVER THE TRUTH WAS AND PRINTED WHAT HE WANTED TO PRINT*" (R. 111 lines 19 through 23)

(g) That Yockey after receiving the requested retraction from Appellant's Counsel, spoke to his Counsel, Richard Hanhart, and *then changed the requested retraction*. (R. 114, 115, 116, 123 and 124)

(h) That the requested retraction was not printd in the same place and location of the April 9, 1975, Article. (R. 125 lines 10 through 21)

Defendant (Respondent herein) moved for Summary Judgment which was denied in April 1978. See Appendix C, *infra*, for the Judgment Entry of this denial and accompanying Memorandum.

The trial proceeded to a conclusion with a jury rendering its verdict supported by jury interrogatories in favor of Petitioner herein.

Respondent herein appealed this verdict to the Fifth Appellate District, Tuscarawas County, Ohio who on December 20th, 1979, rendered its opinion and judgment in favor of Respondent. The Court of Appeals based its decision basically on the ground that the evidence at the Summary Judgement stage did not prove actual malice, and Respondent's Motion for Summary Judgment and Directed Verdict should have been sustained, that the subject article was an expression of opinion and therefore not libelous, and that Revised Code Sections 2739.13 and 2739.14 are unconstitutional. Petitioner, in his reply brief in this appeal, argued the following:

> The Trial Court properly overruled Appellant's Motion for Summary Judgment and its' constitutional rights were protected to the extent allowed by law.
>
> A Jury Verdict supported by interrogatories which responds definitely and certainly to the issues and honors the rights of the parties should not be set aside.

Notice of Appeal to the supreme court of Ohio was filed by Petitioner on January 10th, 1980. The Memorandum in Support of Jurisdiction was filed on February 8th, 1980 and said cause accepted for hearing on the merits on or about September 23rd, 1980. The Propositions of law relevant to this Petition argued by Petitioner were:

> In a libel case, the state of mind of the writer (or Editor), at the time of publishing the libel is a question for the Jury, and actual malice may be proved by direct as well as indirect and cumulative evidence.
>
> In a libel case, where it appears from the evidence that reasonable minds could differ as to which employees or a combination thereof had responsiblility for the publication of the alleged libel, the Defendant's Motion for summary Judgment must be overruled.
>
> In a libel case, where there is an admission by the author of the alleged libel "that he totally disregarded what the truth was and printed what he wanted to print", and where the false statements constituting the alleged libel are inconsistent with prior news stories published by the Defendant newspaper, reasonable minds could differ as to the author's state of mind at the time of publishing the alleged libel and the Defendant's Motion for a directed Verdict must therefore be overruled.
>
> Where a trial Court erroneously overrules a Motion for Summary Judgment but evidence is adduced at trial indicating the existence of genuine issue as to a material fact, the error is harmless and should be disregarded on appeal.
>
> When interrogatories are submitted to a jury and specific findings of fact are made in answer

to said interrogatories, the Court of Appeals may not review the trial record and substitute its findings of fact contrary to those specific findings of fact by the jury.

The Supreme Court of Ohio rendered its decision on December 17th, 1980 holding that the Court of Appeals was correct in finding that the trial Court erred in not granting Respondent's Motion for Summary Judgment. The Court, however, reversed the Court of Appeals conclusion that Revised Code Section 2739.13 and 2739.14 are unconstitutional in that the Court of Appeals had no occasion to pass on their constitutionality and erred in so doing.

Petitioner filed a Motion for Rehearing before the Supreme Court of Ohio on December 29th, 1980 on the grounds that the decision rendered by the Ohio State Supreme Court was contrary to the decision of the United States Supreme Court in the case of *Hutchinson v. Proxmire*, 433 U. S. 111 (1979). The Ohio State Supreme Court overruled Petitioner's Motion for Rehearing on January 22nd, 1981. See Appendix E, *infra*.

REASONS FOR GRANTING THE WRIT.

WHEN A JURY ANSWERS QUESTIONS SPECIFICALLY FINDING ACTUAL MALICE BY CLEAR AND CONVINCING EVIDENCE AT THE TIME OF PUBLICATION, A REVERSAL BY A REVIEWING COURT AT THE PRE-TRIAL SUMMARY JUDGMENT STAGE VIOLATES THIS COURT'S DECISION ENUMERATED IN THE *HUTCHINSON V. PROXMIRE* RULING AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION RENDERED IN THE *HUTCHINSON V. PROXMIRE* CASE AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

There is no question that Petitioner, as a Dover City Councilman and candidate for Mayor, was a public official, so that the defamatory nature of the newspaper article levied against him is to be judged by the actual malice standard of *New York Times v. Sullivan*, 376 U. S. 254 (1964). This standard "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" - that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times v. Sullivan*, 376 U. S. 254, 279-280. This standard has been further defined as focusing on Defendant's attitude toward the truth or falsity of the publication, *Herbert v. Lando*, 441 U. S. 153 (1979); the public official may recover only upon clear and convincing proof of actual malice. *Gertz v. Robert Welch Inc.*, 418 U. S. 323, 342 (1974); *New York Times v. Sullivan*,376 U. S. 254, 285-286. It must be shown that the false statements were made with a "high degree of awareness of their probable falsity" *Garrison v. Louisana*, 379 U. S. 64 (1964). It must also be shown that the actual malice is to be measured at the time of publication *New York Times v. Sullivan*, 376, U. S. 254, 286. As the Court is aware, this is a high standard for a Plaintiff to meet. Petitioner does not question this standard. Rather, Petitioner brings forth the issue of whether or not the Ohio Supreme Court can decide the factual issues of a libel case involving a public figure and a newspaper at the summary judgment stage after a jury verdict supported by jury interrogatories had decided the same issues, in light of recent United States Supreme Court decisions and the Federal Constitution.

As previously stated, Petitioner brought this libel action against Respondent newspaper. Respondent filed a Motion for Summary Judgment pursuant to Rule 56 of the Ohio Rules of Civil Procedure. On proper review of

the evidence submitted at that point, the trial Court, with opinion, overruled Respondent's Motion. See Appendix C, *infra*. The trial Court stated:

> For the purposes of this opinion, the Court will assume that the Plaintiff was a public official and that the Defendant is entitled to the First Amendment rights.

As such, though not explicitly stated, the trial Court was following the standards as set forth by *New York Times v. Sullivan*, and its progeny. Also indicative that the *New York Times* standard was followed is that the trial Court used the "clear and convincing proof" test in stating that reasonable minds could find the facts as presented to the court at that time. The actual holding of the trial Court on Respondent's Motion for Summary Judgment was:

> Applying the rules for construction of affidavit and other materials, reasonable minds could conclude, but not necessarily so, that false statements were published with knowledge of falsity and intentionally or recklessly. the Motion for Summary Judgment should, therefore, be overruled. Appendix C, *infra*.

A trial on the merits was had whereby a jury verdict in favor of petitioner was rendered. The bare fact that a jury verdict in favor of Petitioner was returned is not the point around which this case revolves. Rather it is the interrogatories submitted to the Jury and answered. The interrogatories were as follows:

> (1) (THIS APPENDIX G) DO YOU FIND THAT ANY OF THE STATEMENTS CONTAINED IN DEFENDANT'S EDITORIAL OF APRIL 9, 1975 PLAINTIFF'S EXHIBIT A WAS FALSE?
>
> ANSWER: ALL EIGHT JURORS STATE "YES"

TO THIS INTERROGATORY.

(2) (THIS APPENDIX G) IF YOU FIND THAT ANY OF THE STATEMENTS CONTAINED IN DEFENDANT'S EDITORIAL APRIL 9, 1975 (PLAINTIFF'S EXHIBIT A) WAS FALSE, DO YOU FIND BY CLEAR AND CONVINCING EVIDENCE THAT ANY OF SAID STATEMENTS WAS MADE WITH ACTUAL MALICE AT THE TIME OF PUBLICATION?

ANSWER: SIX OUT OF EIGHT JURORS REPLIED "YES" TO INTERROGATORY NO. 2.

These Jury interrogatories and the answers thereto show convincingly that the jury in this case applied the law as stated in *New York Times v. Sullivan* in a reasonable manner. This was, however, completely ignored by the Ohio Supreme Court. The Ohio Supreme Court, in reviewing this case, focused their entire attention upon Respondent's Motion for Summary Judgment.

> We review the trial court's ruling on appellee's Motion for summary judgment. In so doing, this Court must, as did the Court in *New York Times*, supra, at page 285, "make an independent examination of the whole record."
>
> Summary judgment shall be rendered *** if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact in that the moving party is entitled to judgment as a matter of law. Civ. R. 56 (C) (Dupler v. Journal Co., 64 Ohio St. 2d 116, 119-120 (1980)).

> Applying the foregoing principal to the evidence before the trial Court on Appellee's motion for summary judgment, we find that the lower Court erred in not granting the motion. *Dupler v. Journal Co.*, 64 Ohio St. 2d 116, 121.

In deciding this case solely at the Summary Judgment stage, the Ohio Supreme court contradicted their own citation of the *New York Times* case in that the Ohio Court was to "make an independent examination of the *whole record*". *Dupler v. Journal Company*, 64 Ohio St. 2d. 116, 120. (Emphasis Added). If the Ohio Supreme Court had made such an independent examination of the *whole record*, it would have examined the interrogatories answered by the jury, those interrogatories being despositive of the issued at hand. The Ohio Supreme Court, however, sat as a trier of fact upon an incomplete record.

> It is not sufficient for a libel Plaintiff to show that an interpretation of facts is false; rather, he must prove with convincing clarity that Defendant was aware of a high probalility of falsity. *Dupler v. Journal Co.*, 64 Ohio St. 2d 116, 122-123.

In other words the inquiry is to be centered on Defendant's attitude towards the truth or falsity of the publication, *Herbert v. Lando*, 418 U. S. 153, 160 (1979). Of course, when one looks upon an attitude of an individual or individuals, one is looking at their state of mind. When the state of mind is brought into question in this type of case this situation does not lend itself to summary disposition. *Hutchinson v. Proxmire*, 443 U. S. 111, 120 n9 (1979). The Ohio Supreme Court's opinion points up the infirmities of deciding this particular case at the summary judgment stage. That Court states at page 123, *Dupler v. Journal Co.*, 64 Ohio St. 2d 116, they are unconvinced that Yockey (the Editor) must have

known he was falsely interpreting the Ohio Notification Statute. (See Apendix K, *supra.*) That Court stated that the said Notification Statute may be subject to differing interpretations and that while a perusal of the Ohio Revised Code may have convinced the Editor that he was misinterpreting statute:

> An investigatory failure alone..., without a high degree of awareness of probable falsity, may raise the issue of negligence but not the issue of "actual malice". *Tagawa v. Mauwe Publishing Co.*, (Hawaii 1968) 448 P. 2d 337, 340. *Dupler* at 123.

The *Tagawa* case, however, would indicate by the language "without a high degree of awareness of probable falsity" that if a high degree of awareness of probable falsity was found, the issue of actual malice could be reached. This brings us back to deciding the issue of state of mind to which the *Hutchinson v. Proxmire* case indicates that summary judgment is inappropriate. It also brings to the fore the fact that the jury interrogatories indicate that the jury here did find that there was an awareness of a high probability of falsity. (See Interrogatory #1, Appendix G, *infra.*)

In the paragraph immediately following the above discussion, the Ohio Supreme Court stated:

> Additionally, Appellant's contention that Yockey was aware of the falsity of his editorial inference of an illegal seizure by Dupler is also without merit. *Dupler* at page 123.

At the end of that paragraph appears this sentence:

> It is readily apparent that the aim of the editorial was to criticize the Prosecutor's Office for the handling of this affair. *Seen in this light,* it can hardly be presumed that Yockey should accept the truth of an opposite legal conclusion

> espoused by the very same office he was criticizing. *Dupler v. Journal Co.*, 64 Ohio St. 2d 116, 123-124. (Emphasis Added)

Once again the Ohio Supreme court shows how a summary judgment can be misused in a libel action. That court in deciding the case at the summary judgment level is barred from weighing evidence or choosing among reasonable inferences. *Dupler v. Journal Co.*, 64 Ohio St. 2d 116, 121. In ruling on such a Motion, the court is limited to examining the evidence " taking all permissable inferences and resolving questions of credibility in Plaintiff's favor to determine whether *reasonable minds could find actual malice with convincing clarity*. *Dupler* at 121. That Court also quoted the Ohio Rules of Civil Procedure 56 (C):

> The moving party carries the burden of proving that no genuine issue of fact exists, and all reasonable inferences shall be resolved in favor of the opposing party

But that Court did precisely the opposite. Obviously the Ohio Supreme Court resolved the inference of the article "in the light" most favorable to the moving party, that is, the Respondent newspaper. In so doing, it permitted themselves to once again ignore the jury interrogatories which answered the issues of actual malice in this case.

Finally that Court dismissed Petitioner's contention that the statement from the article, "if he (Petitioner) is qualified as a licensed private investigator," *Dupler* at 124, was made with knowing falsity because the Editor knew from prior articles that Petitioner was acting as a private investigator as being nothing more than a rhetorical question. Once again this raised an issue of fact, a fact which the jury effectively answered.

That Court then directed its attention as to the exact time as to when malice is to be measured. Quoting from

the Court below:

> Yockey's admissions at deposition that he now believes that three editorial comments directed toward Dupler are false is irrelevent. as stated in *Glover v. Harrold Co.* (Mo. 1977,) 549 S. W. 858, 861, "Actual malice is to be measured at the time of publication" (emplasis added by the Ohio Supreme Court). Accord, *New York Times*, supra, at page 286. The fact that Yockey changed his position over one year after the editorial, when presented with additional facts, is not evidence of a state of mind when he wrote the editorial. *Dupler*, at page 124

Clearly, summary judgment was again misused by the Court below to avoid the specific answer of Interrogatory No 2 whereby the jury found by clear and convincing evidence that the publication was published with actual malice *at the time of publication.* (See Interrogatory #2 Appendix G, *infra.*)

The Court summed up its opinion by stating:

> having re-examined all the evidence before the trial Court on the motion for summary judgment, and taking all reasonable inferences in the light most favorable to the Appellant, we find that a jury acting reasonably could not find actual malice of convincing clarity. Therefore summary judgment should have been granted for Appellee. *Dupler* at page 124

This paragraph is further indicative that the State Supreme Court ignored the jury's findings of fact which it used to reach its verdict. The foot note number 6 that the foregoing paragraph referred to states:

> in light of this conclusion, it is unnecessary for this Court to review the Court of

> Appeals determination that Defendant's motion for directed verdict should also have been granted. However, we do note that there was no *additional evidence* adduced at trial from which a reasonable jury could find actual malice, at the time of publication, with convincing clarity. *Dupler* at 124. (Emphasis added)

However on page 111 of the trial record the following appears:

QUESTION: TRIPODI... SO WHAT, IN FACT, DID YOU THEN MR. YOCKEY, WAS TOTALLY DISREGARDED WHATEVER THE TRUTH WAS AND PRINTED WHAT YOU WANTED TO PRINT?

ANSWER: YOCKEY... I WOULD HAVE TO SAY YES.

Therefore, there was additional evidence upon which a reasonable mind could find actual malice at the time of publication with sufficient clarity. From the foregoing it is clear that the Supreme Court of Ohio rendered its decision in total disregard to a reasonable jury acting reasonably that found for Petitioner according to the standards set forth in *New York Times v. Sullivan*. It is Petitioner's contention that this is contrary to both Federal Constitutional Law and Case Law of the United States Supreme Court.

Ever since the landmark case of *New York Times v. Sullivan* was decided, the Courts of this nation have struggled to find the proper balance between a newspaper's First Amendment rights of speech and press and an individual's right to be free from libel. The Courts, in weighing the scale heavily in favor of the First Amendment have been very liberal in utilizing summary procedures. (See eg note 4 in *Dupler v. Mansfield Journal Co.*, page 121) listing numerous cases where summary judgments were granted in favor of Defendants).

Indeed, until recently, the granting of Defendant's summary judgment motion in these type of libel suits seemed to have been developing into a general rule. This Court then decided the case of *Hutchinson v. Proxmire*, 443 U. S. 111 (1979), where this Court reversed the granting of a summary judgment to a defendant, intimating that the issues involved in a libel action brought by a public figure are too complex to be dealt with by summary judgment. *Hutchinson v. Proxmire*, 443 U. S. 111, 120 n9. This Court disagreed with the position taken by the Federal District Court that in determining whether Plaintiff had made an adequate showing of "actual malice", summary judgment should be the rule rather than the exception:

> Considering the nuances of the issues raised here, we are constrained to express some doubt about the so called "rule". The proof of "actual malice" calls a defendants state of mind into question, *New York Times v. Sullivan*,... and does not readily lend itself to summary disposition. *Hutchinson v. Proxmire* 433 U. S. 111, 120 n9.

This Court therefore recognized the fact that Plaintiffs can prevail in these sort of libel actions and that questions of actual malice are properly, and indeed should be, submitted to a jury. When faced squarely with the *Hutchinson* case in Petitioner's motion for rehearing to the Ohio State Supreme Court, raising this exact issue, that Court decided not to rehear Petitioner's case. (Appendix D and E, *infra*.) As such, the State of Ohio does not recognize *Hutchinson v. Proxmire* and the proposition it stands for.

As the right to a trial by jury in civil cases in Federal Courts is a matter of Federal Constitutional mandate, U.S. Const. Amend. VII, so too is a right of a civil litigant to a trial by jury in the State of Ohio. The Ohio

Constitution states:

> The right of tial by jury shall be inviolate, except that, in civil cass, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury. Ohio Const. of 1851, Art. I, 5 (amended 1912).

Petitioner's right to a trial by jury in Ohio is guaranteed by the State Constitution and cannot be invaded or violated by either legislative act or judicial order or decree. *Gibbs v. Village of Gerard*, 88 Ohio St. 34, syll. 2 (1913).

When the Onio State Supreme Court rendered its decision in Petitioner's case limiting its inquiry to the motion for summary judgment, it took it upon itself to decide factually the motive and intent of the editor at the time of the publication. If the case had been filed in Federal Court, this type of action would not be tolerated.

> Summary judgments have a place... though as we warned in *Poller v. Columbia Broadcasting Systems, Inc.*, they are not appropriate "where motive and intent play leading roles" *White Motor Co. v. United States*, 372 U. S. 253, 259 (1963).
>
> Rule 56 (c) Fed Rules Civ. Proc. This rule authorizes summary judgment only where the moving party is entitled to judgment as a matter of law. Where it is quite clear what the truth is... (and where) no genuine issue remains for trial... (for) the purpose of this rule is not to cut litigants off from their right of trial by jury if they really have issues to try. *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U. S. 464, 468 (1961).
>
> While it is true that the Seventh Amendment has

never been applied directly to the states, *Minneapolis and St. Louis Railroad v. Bombolis*, 241 U. S. 211 (1915), the Ohio State Supreme Court did deny Petitioner a right to a jury trial and verdict even though there were issues of fact concerning actual malice and falsity of the newspaper's publication. *Hutchinson v. Proxmire*, 443 U. S. 111 (1979).

When the Ohio Supreme Court denied Petitioner of his jury verdict in this particular manner - that jury verdict guaranteed by the Ohio Constitution - it amounted to a taking of Petitioner's property without due process of law, violative of the Fourteenth Amendment of the United States Constitution.

THERE IS CONFUSION AMONG THE SEVERAL STATES AND VARIOUS FEDERAL COURTS ON THE PROPRIETY OF THE USE OF SUMMARY JUDGMENTS IN DECIDING THE ISSUE OF ACTUAL MALICE IN LIBEL CASES REQUIRING A CLARIFICATION BY THE UNITED STATES SUPREME COURT.

The decision reached by the Ohio State Supreme Court in the instant case is in conflict with the highest appellate Courts of several other states. The Supreme Court of Appeals of West Virginia in *Spouse v. Clay Communications Inc.*, 211 S. E. 2d 674, 689-690 (1975) stated:

> [H]istorically since *New York Times* the clearest legal principal emerging from a reading of libel cases is that each case must be considered by an appellate Court on its facts with a strong sympathy toward protection of the robust political discussion contemplated by the First Amendment. At some point, however, cumulative evidence will show that the line of protection is breached and a jury *must* be permitted to find malice, unless we are to

> adopt the position, articulated by Mr. Justice Black and Mr. Justice Douglass, that proper application of the First Amendment provides an absolute defense for the press to all defamation actions. (emphasis added)

The Ohio State Supreme Court does not recognize such a line in that, as previously stated, a jury found that line was crossed but the Supreme Court did not recognize the right of a jury to so find. In fact, it did not recognize the jury at all.

The Supreme Court of California in *Good Government Group of Seal Beach, Inc., v. Superior Court of Los Angeles County*, 586 P. 2d 572. 150 Cal. Rptr. 258 (1978), denied petition for a writ of mandate to compel a trial Court to grant a defendant's motion for summary judgment in a libel action brought by a former City Councilman filed against the Good Government Group of Seal Beach, Inc. for allegedly libelous comments published in a local homeowners association newsletter. The California Supreme Court denied the writ on the ground that (1) in a libel action brought by a former city councilman, substantial fact issue existed as to whether the article in question, which included references to extortion and blackmail was factual nature or constituted an opinion, precluded summary judgment and (2) where allegedly libelous remarks could have been understood by the average reader as either a statement of fact or statement of opinion, the issue must be left to a jury's determination, and (3) any substantial fact issue existed as to the existence of malice in the article which also precluded summary judgment. Unlike the Supreme Court of Ohio, the Supreme Court of California does recognize that fact issues do exist and that a fact issue existing as to the existence of malice would preclude a summary judgment.

The District of Columbia Court of Appeals in *Nader*

v. Toledano, 408 A. 2d 31 (1979), in recognizing *Hutchinson v. Proxmire* stated because of the compelling First Amendment interest at stake, it will regard summary judgment as a useful method of disposing of constitutional libel action - "*where appropriate*". 408 A. 2d 31, 44 (1979). The situation presented in the instant case shows that (1)there was a substantial issue of fact at the summary judgment stage so that the denying of a summary judgment was appropriate and (2) from the facts solicited at trial (Yockey's admission that he printed what he wanted without regard to the truth), and the jury in answering its interrogatories show that even if it was arguably appropriate to grant the summary judgment in this case, the failure to do so was harmless error. The Ohio Supreme Court, unlike the District of Columbia Court of Appeals, did not limit itself to the proposition that summary judgment should be granted only *when appropriate*.

Finally the Supreme Court of New Hampshire in *Thompson v. Cash*, 402 A. 2d 651 (1979), held that although words complained of, taken in context, where not such that their meaning was unequivocally defamatory, readers of ordinary intelligence and common understanding could reasonably have understood the words as implying fraud or wrongdoing, and since words were susceptible to more than one meaning, whether they were used in the defamatory sense was *question of fact*, 402 A. 2d 651, 656. As in the New Hampshire case, Petitioner presented an issue of fact as to whether or not there was actual malice involved in the subject publication. In New Hampshire, that would preclude a summary judgment, in Ohio it does not. Indeed the fact that the Ohio Supreme Court, by ignoring the jury and the answers to the jury interrogatories in the instant case, actually held as a matter of law that there was no malice. Clearly the Supreme Courts of Ohio and New Hampshire are in complete opposites of

the spectrum on this issue and review by this Court is necessary to resolve this matter for the states.

There is also confusion in the Federal Courts as to this same issue. In *Ciani v. New Times Publishing Co.* 486 F. Supp. 368, 371 (S.D.N.Y. 1979). the United States District Court stated:

> Plaintiff's contention that recent Supreme Court cases have somehow overruled these basic principles of First Amendment law is an unfortunate misperception. For example, the Court's decision in *Herbert v. Lando*, supra, while acknowledging the individual's interest in his reputation as a basic concern, explicitly recognized the basic principles set forth in *New York Times v. Sullivan* and subsequent cases... Plaintiff may agree or disagree with the merits of the specific issues discussed in *Herbert v. Lando*, but for the purposes of the present motion the Court need only note the obvious -that *Herbert v. Lando* should not be read as unraveling the entire tapestry of First Amendment safeguards woven by the Supreme Court over the last fifteen years.
>
> Similarly, Plaintiff attempts to avoid the issues at hand by seizing upon the Supreme Court's dictum in a foot note in *Hutchinson v. Proxmire*... "The proof of "actual malice" calls a defendant's state of mind into question... and does not readily lend itself to summary disposition...in the present posture of the case, however, the propriety of dealing with such complex issues by summary judgment is not before us." This dictum is simply of no relevance to the present motion, which raises no issue of actual malice or state of mind. Instead, the general principle followed in this Court is fully applicable.

Compare this with *Church of Scientology of California v. Siegelman*, 475, F. Supp. 950, 956 (S. D. N. Y. 1979), where the same District Court stated:

> Turning finally to the alleged defamatory remarks made by Defendant Deutsch on the Susskind show, the Court finds that questions exist which preclude disposition at this time. The statements attributed to Deutsch are, unlike the ones attributed to the other defendants, defamatory statements of fact. Deutsch asserts as a defense both that he believes the statements to be true and that, in any event, they were all made without actual malice. He also asserts that the statements alleged were not addressed to these Plaintiffs were neither defamed nor damaged. Finally, he claims that the utterances in the complaint were so edited and placed out of context as to be thoroughly misleading. These defenses, however, raise questions of fact which *cannot be decided at this time. See Proxmire v. Hutchinson...* (Emphasis added)

It can be seen that, as with the several states, the Federal Courts are also in a state of confusion as to how to properly handle a motion for summary judgment presented to them. It is Petitioner's contention this Court was correct in *Hutchinson v. Proxmire* that when a state of mind is presented concerning the issue of actual malice in a libel action of this sort, summary judgment is inappropriate and the case should be submitted to a jury.

SEE ALSO *Yiamouyiannis v. Consumer Union of the United States inc.*, 619 F. 2d 932 (1980), United States Court of Appeals for the Second Circuit stated on page 940:

> Until more directly advised, we think that this

> neutral approach correctly states the rule as it is presently in force: neither grant nor denial of a motion for summary judgment is to be preferred. Defamation actions are, for procedual purposes, such as discovery, see *Herbert v Lando*...or for summary judgment, to be treated no differently from other actions; any "chilling effect" caused by the defense of a lawsuit itself, see *Herbert v. Lando*...*Washington Post Co. v Keogh*...is simply to be disregarded, to have no force and effect.

This case points out the confusion the Federal Courts are facing at this time, their need for direction, the polar opposite view that the Ohio State Supreme Court takes in this situation.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of Ohio.

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CERTIFICATE OF SERVICE

The undersigned, being co-counsel of record for Petitioner and members of the Bar of this Court, do certify that three (3) copies of this Petition for a Writ of Certiorari to the Supreme Court of Ohio/Brief of Petitioner were hand delivered to the office of Richard M. Hanhart, Esq., co-counsel for Respondent, 405 Chauncey Ave., N.W., New Philadelphia, Ohio 44663, Ph: 216-343-5585; and to the office of William A. Kyler, Esq., co-counsel for Respondent, 405 Chauncey Ave., N.W., New Philadelphia, Ohio 44663, Ph: 216-343-5585; on the 21st day of April, 1981.

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